A. Under the facts of this case, does the Governor of the State of Ohio possess *unqualified* executive immunity for his discretionary acts *vis-à-vis* a 42 U.S.C. Section 1983 cause of action?

B. Under the facts of this case, do the President of Kent State University, the Adjutant General of the State of Ohio, the Assistant Adjutant General of the State of Ohio, and the named officers of the State of Ohio's organized militia possess *qualified* executive immunity *vis-à-vis* a 42 U.S.C. Section 1983 cause of action?

3. Respondents are not satisfied with Petitioner's third question (Pet. 3) in that the question's simplistic approach clouds the issues presented. The following two questions are more properly brought to this Court for review:

A. Is a United States District Court, in light of Rule 8, Fed.R.Civ.P., required to take a complaint's allegations as true when deciding a Rule 12b(1), Fed.R. Civ.P., motion to dismiss?

B. Is a United States District Court, in light of Rule 8, Fed.R.Civ.P., required to take a complaint's allegations as true when deciding a Rule 12b(6), Fed.R. Civ.P., motion to dismiss?

CONSTITUTIONAL PROVISIONS AND STATUTES

UNITED STATES CONSTITUTION

Article I, Section 8, Clause 16:

The Congress shall have Power . . . To provide for organizing, arming and disciplining, the Militia, and for governing such Part of them as may be employed in the Service of the United States, reserving to the States respectively, the Appointment of the Officers, and the Authority of training the Militia according to the discipline prescribed by Congress.

Article VI:

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; . . . shall be the supreme Law of the Land . . .

Amendment XI:

The Judicial Power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State . . .

UNITED STATES CODE, TITLE 28

Section 1331:

(a) The district courts shall have original jurisdiction of all civil actions wherein the matter in controversy exceeds the sum or value of $10,000, exclusive of interest and costs, and arises under the Constitution, laws, or treaties of the United States.

Section 1343:

The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:

* * *

(3) To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States;

(4) To recover damages or to secure equitable or other relief under any Act of Congress providing for the protection of civil rights, including the right to vote.

UNITED STATES CODE, TITLE 32

Section 108:

If, within a time to be fixed by the President, a State does not comply with or enforce a requirement of, or

regulation prescribed under, this title its National Guard is barred, wholly or partly as the President may prescribe, from receiving money or any other aid, benefit, or privilege authorized by law.

Section 110:

The President shall prescribe regulations, and issue orders, necessary to organize, discipline, and govern the National Guard.

Section 501:

(a) The discipline, including training, of the Army National Guard shall conform to that of the Army. The discipline, including training, of the Air National Guard shall conform to that of the Air Force.

(b) The training of the National Guard shall be conducted by the several States and Territories, Puerto Rico, the Canal Zone, and the District of Columbia in conformity with this title.

Section 701:

So far as practicable, the same types of uniforms, arms, and equipment as are issued to the Army shall be issued to the Army National Guard, and the same types of uniforms, arms, and equipment as are issued to the Air Force shall be issued to the Air National Guard.

UNITED STATES CODE, TITLE 42:

Section 1983:

Every person who, under color of any statute, ordinance, regulation, custom or usage of any State or Territory, subjects, or causes to be subjected any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

OHIO CONSTITUTION

Article III, Section 10:

He (Executive) shall be commander-in-chief of the military and naval forces of the state, except when they shall be called into the service of the United States.

Article IX, Section 3:

The governor shall appoint the adjutant general, quartermaster general, and such other staff officers, as may be provided for by law. Majors general, brigadiers general, colonels, or commandants of regiments, battalions, or squadrons, shall, severally, appoint their staff, and captains shall appoint their noncommissioned officers and musicians.

Article IX, Section 4:

The governor shall commission all officers of the line and staff, ranking as such; and shall have power to call forth the militia, to execute the laws of the state, to suppress insurrection, and repel invasion.

OHIO REVISED CODE

Section 3341.01:

The Bowling Green state normal school, and the Kent state normal school, established under 101 O. L. 320 shall be known as the 'Bowling Green State University' and the 'Kent State University,' respectively.

Section 3341.02 (B):

The government of Kent state university is vested in a board of nine trustees, who shall be appointed by the governor, with the advice and consent of the senate.

Section 3341.04:

The boards of trustees of Bowling Green state university and Kent state university, respectively, shall elect, fix the compensation of, and remove the president and such number of professors, teachers, and other employees as may be deemed necessary by said boards. The boards shall do all things necessary for the proper

maintenance and successful and continuous operation of such universities.

Section 5919.02:

All commissioned officers of the Ohio national guard shall be appointed by the governor as commander in chief, upon the recommendation of the commanding officers of the organizations to which such officers are to be assigned for duty, and be commissioned according to grade in the department, corps, or arm of the service in which they are appointed.

Section 5919.05:

Commissioned officers of the Ohio national guard shall take and subscribe to the following oath of office: 'I, ..., do solemnly swear that I will support and defend the constitution of the United States and the constitution of the state of Ohio, against all enemies, foreign and domestic; that I will bear true faith and allegiance to the same; that I will obey the orders of the president of the United States and of the Governor of the state of Ohio; that I make this obligation freely, without any mental reservation or purpose of evasion, and that I will well and faithfully discharge the duties of the office of ..... in the National Guard of the United States and of the state of Ohio, upon which I am about to enter, so help me God.'

Section 5923.21:

The organized militia may be ordered by the governor to aid the civil authorities to suppress or prevent riot or insurrection, or to repel or prevent invasion, and shall be called into service in all cases before the unorganized militia.

Section 5923.22:

When there is a tumult, riot, mob, or body of men acting together with intent to commit a felony, or to do or offer violence to person or property, or by force and violence break or resist the laws of the state, the commander in chief may issue a call to the commanding

officer of any organization or unit of the organized militia, to order his command or part thereof, describing it, to be and appear, at a time and place therein specified, to act in aid of the civil authorities.

No officer or enlisted man in the organized militia, shall refuse to appear at the time and place designated when lawfully directed to do so in conformity to the laws for the suppression of tumults, riots, and mobs, or shall fail to obey an order issued in such case. [See: penalty provision, O.R.C., Section 5923.99(A) *infra.*]

Section 5923.231:

After issuing an order to duty pursuant to section 5923.21 of the Revised Code, the governor, if in his judgment any breakdown of law and order impends; may by proclamation, declare that the organized militia under the command of the governor shall execute the laws and keep the peace in a designated area. Under these circumstances, any arrest and detention of civilians by military authorities shall be for the purpose of escorting such civilians to civil authorities. The governor shall, by subsequent proclamation, order cessation of the duties entrusted to the militia when, in his judgment, his original proclamation is no longer required.

Section 5923.99 (A):

Whoever violates Section 5923.22 or 5923.31 of the Ohio Revised Code shall be fined not more than one thousand dollars or imprisoned not more than six months, or both.

STATEMENT OF CASE

Excepting the adversary comment contained in the "Summary of the Complaint" (Pet. 5-8), respondents are satisfied with petitioner's resumé of the complaint's allegations. Further, respondents are satisfied with petitioner's portrayal of "Proceedings Below" (Pet. 8-10) subject to

the following correction. After quoting from the trial court's decision, petitioner states, " . . . no factual matter was offered by defendants to support any findings" (Pet. 9). This statement by petitioner is not correct since relevant Executive Proclamations, containing critical factual matter, were attached to respondents' motion to dismiss and presented to the trial court (A. 3a, 23a-26a).

Respondents wish, however, to emphasize and bring to this Court's attention certain realities present before the trial court.

1. There were but seven defendants within the personal jurisdiction of the trial court, and upon whom the judgment of the court of appeals is premised; to-wit, Governor Rhodes, Adjutant General Del Corso, Assistant Adjutant General Canterbury, Major Jones, Captains Martin and Srp, and President White (A. 20a).

2. Presented to the trial court as attachments to respondents' motion to dismiss were relevant Executive Proclamations evidencing that, at the time petitioner's alleged cause of action arose, the Ohio National Guard, including the respondents herein, had been called to active duty pursuant to the law of Ohio (A. 3a, 23a-26a).

3. Further, the relevant Executive Proclamations mentioned above factually demonstrated to the trial court that a condition of insurrection and rampage existed at the Kent State University, and that, in response thereto, the Ohio National Guard was ordered by Governor Rhodes to take that action necessary to protect life and property on and to restore order to the Kent State University (A. 3a; 23a-26a).

4. Petitioner's complaint acknowledges that, at the time petitioner's alleged cause of action arose, the respondents were all agents of the State of Ohio; that respondents were

ordered to active duty by the Governor of Ohio; and that none of the respondents herein fired the shot, killing petitioner's decedent (A. 83a-91a).

5. Respondents Rhodes, Del Corso, and Canterbury are specifically alleged to have ordered incapable Ohio National Guard troops to be present at the Kent State University and to carry guns loaded with live ammunition at the time they were ordered to this campus (A. 87a-88a).

SUMMARY OF ARGUMENT

For purposes of logically responding to petitioner's "Reasons for Allowance of the Writ" (Pet. 11), Respondents will depart from petitioner's organization.

The "ARGUMENT", hereinafter set forth, initially considers the substance of the third question presented for review, determining the appropriate allegiance due allegations of pleadings when ruling upon a Rule 12b(1), Fed. R.Civ.P., motion to dismiss (ARGUMENT, I.A., p. 10 *infra*). Thereafter, a Rule 12b(6), Fed.R.Civ.P., motion to dismiss will be similarly considered and distinguished (ARGUMENT, I.B., p. 12 *infra*).

Secondly, respondents' "ARGUMENT" will consider the propriety of the lower courts' ruling that petitioner's Section 1983 cause of action fails to state a claim upon which relief can be granted; to-wit, the applicability of the doctrine of executive immunity to the realities at bar (ARGUMENT, II, p. 12 *infra*). Thirdly, and notwithstanding this Court's opinion relative to the doctrine of executive immunity, it will be demonstrated that federal courts lack jurisdiction of the complaint's subject matter pursuant to the Eleventh Amendment, United States Constitution (ARGUMENT, III., p. 16 *infra*).

Further, and again separate and independent from the above, respondents' "ARGUMENT" will make evident that certain allegations of petitioner's complaint are properly dismissed since these allegations involve non-justiciable political questions (ARGUMENT, IV., p. 23 *infra*). Finally, these allegations will be shown properly dismissed since the Federal Government is an indispensable party thereto (ARGUMENT, V., p. 27 *infra*).

In sum, respondents' arguments, and necessarily the judgment of the lower courts, will be shown to be entirely consistent with the Federal Rules of Civil Procedure, and earlier decisions and reasoning of the federal courts.

ARGUMENT

I. *The Lower Court Properly Considered The Complaint's Allegations.*

Respondents' Argument will initially consider petitioner's third question for review (Pet. 3). The substance of this question is properly separated and viewed in relation to: (A.) Rule 12b(1), Fed.R.Civ.P., motions to dismiss, and (B.) Rule 12b(6), Fed.R.Civ.P., motions to dismiss. The propriety of this division is apparent from the lower appellate court's affirmance of the complaint's dismissal upon two independent bases; to-wit, the federal courts' lack of subject matter jurisdiction (Eleventh Amendment), and the complaint's failure to state a claim upon which relief can be granted (Executive immunity) (A. 20a).

A. *Is a United States District Court, in light of Rule 8, Fed.R.Civ.P., required to take a complaint's allegations as true when deciding a Rule 12b(1), Fed.R.Civ.P., motion to dismiss?*

It is well-established that courts of limited jurisdiction, including the federal courts of this country, may weigh the merits of a motion putting to issue the court's subject matter jurisdiction. Rule 12h(3), Fed.R.Civ.P., endorses this basic precept:

> Whenever it appears by suggestion of the parties or otherwise that the court lacks jurisdiction of the subject matter, the court shall dismiss the action.

This Court, interpreting the predecessor to Rule 12h(3), stated the rule in *McNutt v. General Motors Accept. Corp.*, 298 U.S. 178, 184 (1935):

> The trial court is not bound by the pleadings of the parties, but may, on its own motion, if led to believe that its jurisdiction is not properly invoked, 'inquire into the facts as they really exist.'

See also: Wetmore v. Rymer, 169 U.S. 115 (1898); *Gilbert v. David*, 235 U.S. 561 (1915); *North Pacific Steamship Co. v. Soley*, 257 U.S. 216 (1921); 5 C. Wright and A. Miller, *Federal Practice and Procedure*, Civil Section 1350 (1969); 32 Am. Jur. 2d, *Federal Practice and Procedure*, Sections 170-172 (1967).

Hence, notwithstanding the pleading guidelines of Rule 8, Fed.R.Civ.P., the court may inquire into the facts when determining its jurisdiction over the subject matter of an action.

It is particularly relevant to note that all the cases cited by petitioner under the discussion of his third question (Pet. 16) deal with this Court's consideration of Rule 12b(6) motions to dismiss. [*Cruz v. Beto*, 405 U.S. 319 (1972); *Haines v. Kerner*, 404 U.S. 519 (1972); *Jenkins v. McKeithen*, 395 U.S. 411 (1969); *Conley v. Gibson*, 355 U.S. 41 (1957)] Petitioner thereafter concludes:

> On the basis of such unprincipled conduct, it would be a rejection of reality to engage in the presumption that the decision of Judge Connell and the vote of Judge O'Sullivan were not caused, at least in part, by their views of the facts (Pet. 16).

Respondents submit that the lower courts' "views of the facts," when ruling upon respondents' motion attacking the court's jurisdiction of the subject matter, were entirely consistent with the Federal Rules of Civil Procedure and previous rulings by this Court. The determination of the lower court dismissing petitioner's action for lack of subject matter jurisdiction in accordance with the above, will be considered hereinafter (ARGUMENT, III., p. 16 *infra*).

B. Is a United States District Court, in light of Rule 8, Fed.R.Civ.P., required to take a complaint's allegations as true when deciding a Rule 12b(6), Fed.R.Civ.P., motion to dismiss?

Respondents would, themselves, answer the above-posed question in the affirmative and have no quarrel with petitioner's discussion of his third question (Pet. 16), limiting the discussion's bounds to Rule 12b(6) motions to dismiss. The propriety of the lower court's judgment dismissing petitioner's action for its failure to state a claim upon which relief can be granted will next be considered.

II. The Lower Court Properly Dismissed The Complaint For Its Failure To State A Claim Upon Which Relief Could Be Granted.

Petitioner's second question (Pet. 3) is predicated upon a legal conclusion never drawn by the court below. The majority opinion held that the *Governor of the State of Ohio*, under the facts of this case, had *absolute* immunity to petitioner's Section 1983 action (A. 12a), and that the *remaining respondents* possessed a *qualified* immunity

(A. 20a). Therefore, it is necessary to restate petitioner's second question presented for review.

A. *Under the facts of this case, does the Governor of the State of Ohio possess unqualified executive immunity for his discretionary acts vis-à-vis a 42 U.S.C. Section 1983 cause of action?*

This specific issue will be considered in a separate brief in opposition filed on behalf of Respondent, Governor James Rhodes.

B. *Under the facts of this case, do the President of Kent State University, the Adjutant General of the State of Ohio, the Assistant Adjutant General of the State of Ohio and the named officers of the State of Ohio's organized militia possess qualified executive immunity vis-à-vis a 42 U.S.C. Section 1983 cause of action?*

Respondents agree that the lower court was required to accept the allegations of petitioner's complaint as true when considering the sufficiency of the complaint under a Rule 12b(6), Fed.R.Civ.P., motion to dismiss. Hence, for present purposes, it is necessary to re-emphasize certain uncontradicted facts before the lower court.

First, at the time petitioner's alleged cause of action arose, the respondents were all agents of the State of Ohio (A. 83a-91a), and, further, were ordered to active duty by the Governor of Ohio to protect life and property on and to restore order to the Kent State University (A. 3a; 23a-26a). Also, as the complaint acknowledges, none of the respondents herein fired the shot, killing petitioner's decedent (A. 88a).

Petitioner contends that the lower court's executive immunity determination is in conflict with a consistent line of decisions adopting the position that there is *no executive*

immunity to a Section 1983 cause of action (Pet. 14). Respondents submit that petitioner's recitation of law is totally inaccurate.

In support of petitioner's proposition that there is no executive immunity *if* the action is brought under Section 1983, the following cases are cited (Pet. 14): *Jobson v. Henne*, 355 F.2d 129 (2nd Cir. 1966) (1983 action by an inmate of a state mental institution against officers and supervising psychiatrist of the institution); *Birnbaum v. Trussel*, 347 F.2d 86 (2nd Cir. 1965) (1983 action by doctor against commissioners of city department of hospitals and union president for dismissal on grounds of racial prejudice); *Meredith v. Allen County War Memorial Hospital Commission*, 397 F.2d 33 (6th Cir. 1968) (1983 action by doctor against hospital commission and individual commission members); *McLaughlin v. Tilendis* 398 F.2d 287 (7th Cir. 1968) (1983 action by former probationary teachers against superintendent and elected members of board of education); *Joseph v. Rowlen*, 402 F.2d 367 (7th Cir. 1968) (1983 action against police officer for false arrest); *Whirl v. Kern*, 407 F.2d 781 (5th Cir. 1968) (1983 action against sheriff for holding prisoner in jail after charges had been dismissed); *Sostre v. McGinnis*, 442 F.2d 178, 205 n. 51 (2d Cir. 1971) (1983 action by prisoner against state commissioner of correction and two prison wardens); *Carter v. Carlson*, 447 F.2d 358 (D.C. Cir. 1971) *cert. granted sub nom., District of Columbia v. Carter*, 404 U.S. 1014 (1972) (1983 action against precinct captain and police chief and the District of Columbia); *Roberts v. Williams*, 456 F.2d 819 (5th Cir. 1971), *cert. denied*, 404 U.S. 866 (1971), addendum 456 F.2d 834 (5th Cir. 1972) (1983 action by minor prisoner against trusty, youth court judge, municipal court judge, superintendent of county farm, member of board of supervisors of county, county sheriff, and sheriff's officials); *Jones v. Perrigan*,

459 F.2d 81 (6th Cir. 1972) (1983 action against FBI agent for false imprisonment and malicious prosecution).

Looking to the cases cited by petitioner for the proposition that there is a consistent line of decisions adopting the position that there is *no executive immunity* available against an action brought under Section 1983 (Pet. 14), respondents submit that petitioner's contention is not even remotely supported by the cases cited above. Neither *Meredith*, nor *Whirl*, nor *Joseph*, nor *Sostre* (except in the footnote, hardly characterized as the holding of a court) discuss any issue concerning executive immunity and consequently have no relevance to the case at bar. *Jobson*, *McLaughlin*, *Carter*, *Roberts* and *Jones* all recognize the existence of executive immunity as a defense to a Section 1983 action but would apply it sparingly. It must be noted that these cases all recognize the viability of the doctrine of executive immunity under a Section 1983 cause of action. The holding of these cases is entirely consistent with the holding of the lower court herein. The *Birnbaum* case is distinguishable from the case at bar since it was brought on the grounds of racial discrimination which would necessarily involve different policy considerations. *See*, Comment, *Civil Liability of Subordinate State Officials Under the Federal Civil Rights Acts and the Doctrine of Official Immunity*, 44 Calif. L. Rev. 887 (1956).

Contrarily, a consistent line of cases hold state governmental officials immune to Section 1983 actions for discretionary acts done within the scope of their authority. *See, e.g., Hoffman v. Halden*, 268 F.2d 280 (9th Cir. 1959); *Franklin v. Meredith*, 386 F.2d 958 (10th Cir. 1967); *Lumbermens Mutual Casualty Company v. Rhodes*, 403 F.2d 2 (10th Cir. 1968), *cert. denied*, 394 U.S. 965 (1969); *Silver v. Dickson*, 403 F.2d 642 (9th Cir. 1968).

Examining the realities before the lower courts *(See,* STATEMENT OF CASE, p. 7 *supra)* it is clear that respondents were all acting within their sphere of executive authority and, more importantly, none of the respondents fired the fatal shot. The court's determination that the President of Kent State University, the Adjutant General of the State of Ohio, the Assistant Adjutant General of the State of Ohio and the named officers of the Ohio National Guard were shielded from suit under the doctrine of executive immunity, is in total harmony with the great weight of authority.

III. *The Trial Court Lacked Subject Matter Jurisdiction.*

The trial court's lack of subject matter jurisdiction is separate from and independent of the failure of petitioner's complaint to state a claim upon which relief can be granted. However, if this Court should determine the doctrine of executive immunity inapplicable to any one of the respondents, the trial court's lack of subject matter jurisdiction becomes even more convincing. This functional reality will be demonstrated herein.

Notwithstanding a literal reading of the Eleventh Amendment, United States Constitution, there is no question but that this Amendment prohibits federal courts from exercising jurisdiction over actions brought against a state at the instance of a citizen of the same state. *Great Northern Life Insurance Co. v. Read,* 322 U.S. 47, 51 (1944); *Fitts v. McGhee,* 172 U.S. 516, 524 (1899); *Hans v. Louisiana,* 134 U.S. 1, 10, 15 (1890). The Eleventh Amendment, being part of the Supreme Law of the Land, cannot be diminished by congressional enactment. Congress did not and could not expose the states to federal jurisdiction by creating Section 1983 causes of action and providing the corollary jurisdictional provisions (28 U.S.C. Sections 1331, 1343). *Parden v. Terminal R. of Alabama Docks*

Dept., 377 U.S. 184, 186 (1964); *Ex parte New York*, 256 U.S. 490, 497-498 (1921); *Hans v. Louisiana*, *supra*, 134 U.S. at 10.

Further, it is established that the Eleventh Amendment cannot be avoided by naming nominal party defendants when the essential nature and effect of the lawsuit affects a sovereign state. *Ford Motor Co. v. Treasury Department*, 322 U.S. 459, 464 (1944); *Ex parte New York*, *supra*, 256 U.S. at 500; *Re Ayers*, 123 U.S. 443, 492 (1887). The relevant criteria for determining when a lawsuit's essential nature and effect results in the action being against a sovereign are well-summarized by this Court in *Dugan v. Rank*, 372 U.S. 609, 620 (1963):

> The general rule is that a suit is against the sovereign if 'the judgment sought would expend itself on the public treasury or domain, *or* interfere with the public administration,' *Land v. Dollar*, 330 U.S. 731, 738, 91 L.Ed. 1209, 1215, 67 S.Ct. 1009 (1947), *or* if the effect of the judgment would be 'to restrain the government from acting, *or* to compel it to act.' *Larson v. Domestic & Foreign Commerce Corp.*, *supra* (337 U.S. at 704); *Re New York*, 256 U.S. 490, 502, 65 L.Ed. 1057, 1062, 41 S.Ct. 588 (1921). (Emphasis added)

It is important to note that these "tests" are stated in the disjunctive, and therefore, if any one of the standards is met in a given case, the suit must be held to be against the sovereign. These determinations are relevant and crucial to the achievement of the object and purpose underlying the Eleventh Amendment, as defined by this Court in *Re Ayers*, *supra*, 123 U.S. at 505-506:

> The very object and purpose of the Eleventh Amendment were to prevent the indignity of subjecting a State to the coercive process of judicial tribunals at the instance of private parties. It was thought to be neither becoming nor convenient that the several

> States of the Union, invested with that large residuum of sovereignty which had not been delegated to the United States, should be summoned as defendants to answer the complaints of private persons, whether citizens of other States or aliens, or that the course of their public policy and the administration of their public affairs should be subject to and controlled by the mandates of judicial tribunals without their consent, and in favor of individual interests. To secure the manifest purposes of the constitutional exemption guaranteed by the 11th Amendment requires that it should be interpreted, not literally and too narrowly, but fairly, and with such breadth and largeness as affectually to accomplish the substance of its purpose.

In accordance with the established law set forth above, the Eleventh Amendment prohibited the trial court from acquiring jurisdiction over petitioner's stated causes of action.

Before the trial court, when ruling upon respondents' Rule 12b(1) motion to dismiss, was the factual matter alleged in petitioner's complaint and contained in the Executive Proclamations attached to the motion *(See,* STATEMENT OF CASE, pp. 7 *supra*). Also, present in the trial court was the law of Ohio defining the legal obligations of respondents to the sovereign.[2] The trial court, weighing these realities (ARGUMENT, I.A. p. 10 *supra*) concluded, under the applicable standards announced by this Court in *Dugan v. Rank, supra,* that it was without subject matter jurisdiction. This judgment was entirely

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[2]The Ohio Constitution places upon the Governor of Ohio the responsibility of Commander-in-Chief of the Ohio National Guard (Ohio Const. art. III, sec. 10) and the obligation of appointing the Adjutant General and Assistant Adjutant General of the state's Militia (Ohio Const. art. IX, sec. 3). Further, the duty of appointing line and staff officers and ordering them to service when necessary "to execute the laws of the state, to suppress insurrection, and repel invasion," is posited with the Governor (Ohio Const. art. IX, sec. 4). (footnote continued).

consistent with the prior decisions and reasoning of this Court, and demanded by the Eleventh Amendment.

Ohio would be restrained from acting, and the public administration of the law greatly curtailed if the federal courts were to assume jurisdiction over petitioner's causes of action. Although not factually identical, the wisdom of Judge Learned Hand in *Gregoire v. Biddle*, 177 F.2d 579 (2nd Cir. 1949), attests to these dire effects:

> . . . it is impossible to know whether the claim is well founded until the case has been tried, and . . . to submit all officials, the innocent as well as the guilty, to the burden of a trial and to the inevitable danger of its outcome, would dampen the ardor of all but the most resolute, or the most irresponsible, in the un-

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The statutory law of Ohio states that all commissioned officers of the Ohio National Guard shall be appointed by the Governor, and obligates all commissioned officers to swear their allegiance to the state, and to obey the orders of the Governor (Ohio Rev. Code Sections 5919.02, 5919.05). The Governor has the sovereign's sanction to order the Ohio National Guard, "to aid civil authorities to suppress or prevent riot or insurrection, or to repel or prevent invasion . . . " (Ohio Rev. Code Sections 5923.21, 5923. 231). No officer may refuse to appear when ordered by the Governor to suppress or prevent riot or insurrection (Ohio Rev. Code Section 5923.22) in accordance with the above. If an officer of the Ohio National Guard fails to obey the Governor's order, he may be fined $1,000, or imprisoned six months, or both [Ohio Rev. Code Section 5923.99(A.)].

Relative to the status and obligations of Respondent White, President of Kent State University, the statutory enactments of the sovereign designate the Kent State University a state institution (Ohio Rev. Code Section 3341.01) and vest its government in a board of trustees, appointed by the governor with the advice and consent of the senate [Ohio Rev. Code Section 3341.02(B)]. Further, this board of trustees is responsible to the sovereign for the election of a president and for the successful operation of the university. The President of Kent State University is, consequently, responsible to the State of Ohio through the board of trustees to do all things necessary for the proper maintenance and successful and continuous operation of such university (Ohio Rev. Code Section 3341.04).

flinching discharge of their duties. Again and again the public interest calls for action which may turn out to be founded on a mistake, in the face of which an official may later find himself hard put to it to satisfy a jury of his good faith. (177 F.2d at 581)

In the case of *Barr v. Matteo*, 360 U.S. 564 (1959), this Court recognized the inevitable restraint on the sovereign generated by lawsuits against the sovereign's agents:

> We are called upon in this case to weigh in a particular context two considerations of high importance which now and again come into sharp conflict—on the one hand, the protection of the individual citizen against pecuniary damage caused by oppressive or malicious action on the part of officials of the Federal Government; and on the other, the protection of the public interest by shielding responsible governmental officers against the harassment and inevitable hazards of vindictive or ill-founded damage suits brought on account of action taken in the exercise of their official responsibilities. (360 U.S. at 564-565)
>
> * * *
>
> The reasons for the recognition of the privilege have been often stated. It has been thought important that officials of government should be free to exercise their duties unembarrassed by the fear of damage suits in respect of acts done in the course of those duties—suits which would consume time and energies which would otherwise be devoted to governmental service and the threat of which might appreciably inhibit the fearless, vigorous, and effective administration of policies of government. The matter has been admirably expressed by Judge Learned Hand: (Quoting *Gregoire v. Biddle, supra)* (360 U.S. at 571)
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> * * *
>
> It seems to us wholly chimerical to suggest that what hangs in the balance here is the maintenance of high standards of conduct among those in the public ser-

> vice. To be sure, as with any rule of law which attempts to reconcile fundamentally antagonistic social policies, there may be occasional instances of actual injustice which will go unredressed, but we think that price a necessary one to pay for the greater good. And there are of course other sanctions than civil tort suits available to deter the executive official who may be prone to exercise his functions in an unworthy and irresponsible manner. We think that we should not be deterred from establishing the rule which we announce today by any such remote forebodings. (360 U.S. at 576)

Under the reasoning of *Gregoire* and *Barr*, the State of Ohio would be restrained from acting in time of rampage and insurrection, and the public administration of this sovereign's laws would be greatly impeded if the federal courts were to assume subject matter jurisdiction over petitioner's causes of action. On balance, before the trial court, was the State of Ohio's ability to protect life and property within her bounds.

If in times of insurrection and emergency demanding discretionary acts, Ohio's public officials, functioning under their unchallenged obligation to the sovereign, could, at the stroke of a vindictive plaintiff's pen, be subjected to the irrationality of hindsight and *ex post facto* speculation, this sovereign would be hard pressed to find responsible officials to act. This reality, manifest in the trial court and court of appeals, prohibited the federal court from acquiring subject matter jurisdiction over petitioner's action. If this Court were to determine that the doctrine of executive immunity is not available to shield executive officials from the inevitable lawsuits, the adverse effects upon the sovereign become even more demonstrable.

Rather than departing from the established law, the lower courts' judgment was mandatory: under the facts

at bar; in accordance with the Eleventh Amendment; the object and purpose behind this Amendment; and the tests announced by this Court in *Dugan v. Rank, supra.* The trial court, balancing the facts at bar, was bound by the Supreme Law of the Land.

Ex parte Young, 209 U.S. 123 (1908) and its progeny, cited by petitioner, are not in point. *Young* involved an injunction action brought against a state's attorney general seeking to prohibit the *in futuro* enforcement of an unconstitutional state statute. Under the fiction that a state never acts unconstitutionally, this Court held that the injunction was against the attorney general acting on his own frolic. Petitioner's action is readily distinguishable. Petitioner's lawsuit demands an *ex post facto* evidentiary hearing which, as shown above, is the very evil that would seriously affect Ohio's ability to protect life and property within the state. Further, the fiction of *Young* is irrelevant since the law of Ohio, obligating respondents to act at Kent State University, is not being constitutionally challenged.

Judge Celebreezze, dissenting in the court of appeals, concludes that, because petitioner is neither seeking money damages from the state treasury nor interfering with Ohio's contract rights, her suit cannot affect this sovereign. (A. 41a). Such a narrow approach not only ignores the expressed standards in *Dugan v. Rank, supra,* but is lacking in logic.

This Court, on numerous occasions, has identified the most important function of government to be providing security for the citizenry and the protection of their property. *Miranda v. Arizona,* 384 U.S. 436, 539 (1966) (dissenting opinion, White, J.); *Lanzetta v. New Jersey,* 306 U.S. 451, 455 (1938); *Martin v. Mott,* 25 U.S. (12 Wheat.) 19 (1927). Further, as recognized by the dissenting judge,

this Court has expressly held that if a suit seeks damages from a state's treasury *(Ford Motor Co. v. Department of Treasury, supra)* or seeks to compel a state to specifically perform its contract obligations *(Ex parte New York, supra)*, the suit must be declared violative of the Eleventh Amendment, notwithstanding the fact that the state was not a named party to the lawsuit. Even ignoring the expressed tests of *Dugan v. Rank, supra*, it most surely follows that if the state's fiscal integrity and immunity to contract obligations are protected, the highest function of state government will be even more zealously insured.

Each case, presenting facts similar to those now being reviewed, must be analyzed separately; *i.e.*, the tests of *Dugan v. Rank, supra*, must be applied to the circumstances predicating each complaint, with the balance adjudged by the trial court. In those cases where the trial court determines, as here, that a claimant's Section 1983 action diminishes the object and purpose of the Eleventh Amendment, the complaint must yield to the Supreme Law, and the court must conclude that it is without subject matter jurisdiction.

IV. ***The Allegations Of Petitioner's Complaint Concerning The Propriety Of Training, Weaponry, And Orders Of The Ohio National Guard Raise Non-Justiciable Political Questions.***

Petitioner's complaint alleges that Respondents Rhodes, Del Corso, and Canterbury intentionally and recklessly ordered incapable Ohio National Guard troops to the Kent State University, further permitting these troops to carry guns loaded with live ammunition. (A. 87a-88a.) The identical issue presented herein by these allegations is now before this Court in the case of *Morgan v. Rhodes*, 456 F.2d 608 (6th Cir. 1972), *cert. granted sub nom., Gilligan v. Morgan*, 34 L.Ed.2d 217 (1972).

The indicia for determining the presence of a political question are defined by this Court in *Baker v. Carr*, 369 U.S. 186 (1962):

> It is apparent that several formulations which vary slightly according to the settings in which the questions arise may describe a political question, although each has one or more elements which identify it as essentially a function of the separation of powers. Prominent on the surface of any case held to involve a political question is found a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question. (369 U.S. at 217)

As is indicated in *Baker*, (369 U.S. at 217), the presence of any one of these factors justifies dismissal under the political question doctrine. In the instant case, all of the defined elements are present.

First, there is a textually demonstrable constitutional commitment of the issue to a coordinate political department. Article I, Section 8, Clause 16, of the Constitution, places with Congress the authority to prescribe weaponry and discipline for the Militia. Congress, acting within this constitutional delegation of power, has enacted law providing for the training of the Army National Guard, 32 U.S.C. Section 501 (See also, 32 U.S.C. Sections 502-507). Likewise, Congress has prescribed the arms and equipment issued to the Army National Guard. 32 U.S.C. Section 701.

In addition, Congress has authorized the President to prescribe regulations governing the Army National Guard and has given the President the means to enforce the regulations which he and Congress prescribe. 32 U.S.C. Sections 110, 108, respectively.

Secondly, the judiciary is ill-suited to resolve issues involving the ever-changing training, weaponry and orders for the National Guard. The judiciary, in making its determination, is limited to the evidence presented and the arguments made by the parties; however, many other considerations are necessary to determine the appropriate training and equipment for the Militia. Such training and equipment must be sufficient to protect the safety of the troops themselves; to protect the safety and property of those in the area of the disturbance; to enable the troops to control the disturbance and restore order as soon as possible; *etcetera*. Both the legislative and executive branches can deal with these complex issues in a wider context and provide a more rational and sophisticated solution than the judiciary.

Further, the judiciary does not have adequate means to discover the information necessary to resolve these military issues. There are continuous advancements in the equipment and weapons which could be made available to National Guard troops. Constant developments and changes are made in military theory relating to the proper method of training troops. Neither the courts nor the individual parties to a litigation have ready access to this necessary information. Both the executive and legislative branches of the government have means of gathering the relevant data vastly superior to that of the judiciary.

Even if the courts could have access to such information, the legislature or the executive are in a better position to

render the best possible solution to the problem. The court has no means to determine how new equipment or new theories of military training will function in an actual emergency. In contrast, the Executive, through the Department of the Army, has the means available for testing new equipment and new methods of training under simulated emergency situations.

Finally, the judgment which the judiciary might reach in the instant case would express a lack of respect for the executive and legislative branches of government. As shown above, Congress is vested by the Constitution with the authority and responsibility to train and provide weapons and equipment for members of the National Guard. The President also has the authority to prescribe regulations concerning these matters. Any judicial determination as to the proper training, equipment or orders of the National Guard would necessarily indicate a lack of confidence in the ability of the legislative and executive branches to carry out their prescribed responsibilities.

A decision by the judiciary would also create the potentiality of multifarious, and even conflicting, pronouncements by the various branches on this subject. Congress, pursuant to its constitutional authority, has enacted statutes governing the training and weaponry of the National Guard. *See, e.g.*, 32 U.S.C. Section 501, *et seq.*, and 32 U.S.C. Section 701. Congress may enact new statutes or amend existing statutes in the future. The President has prescribed regulations concerning the training of the National Guard. He also may prescribe new regulations on the subject in the future. If the Court attempts to prescribe the training, weapons or orders of the National Guard, there is a real possibility that such a mandate would conflict with either existing or future directives from Congress or the President.

The most imminent danger caused by a conflict between a judicial order and the directives of Congress or the President is not the "embarrassment" mentioned in the *Baker, supra,* 369 U.S. at 217. Rather, it is the confusion and resulting delay which such conflicting directives would cause. It would be necessary to seek a judicial resolution of the conflict before the National Guard could act. In dealing with civil disorders, the state must be able to act immediately. If there is a delay, the harm to be prevented could be accomplished without resistence.

For the reasons stated above, it is patent that petitioner's allegations concerning training, weaponry, and orders of the Ohio National Guard involve non-justiciable political questions.

V. ***The Federal Government Is An Indispensable Party To The Adjudication Of Petitioner's Allegations Concerning The Training, Weaponry, And Orders Of The Ohio National Guard.***

It stands without citation that the Federal Government cannot be made a party to petitioner's lawsuit. Further, as has been demonstrated above (ARGUMENT, IV. p. 23 *supra),* the Federal Government is intrinsically involved under the allegations of petitioner's complaint concerning the training, weaponry, and orders of the Ohio National Guard.

Pursuant to Rule 19(a), Fed.R.Civ.P., it is clear that the Federal Government should, in view of petitioner's allegations, be made a party to the instant action. Since the Federal Government is indispensable and cannot be joined as a party herein, the court, under Rule 19(b), Fed.R. Civ.P., was correct in dismissing petitioner's causes of action.

CONCLUSION

Respondents respectfully submit that the petition for writ of certiorari herein should be denied since the determination of the lower courts is consistent with the law of this country. In the first instance, the Eleventh Amendment, United States Constitution, prohibits the federal courts from assuming subject matter jurisdiction. Secondly, and independent of the above, the lower court correctly held that petitioner's complaint failed to state a claim upon which relief could be granted.

Further, and again independent of the above, those allegations of petitioner's complaint putting to issue the training, weaponry, and orders of the Ohio National Guard involve non-justiciable determinations of a political nature. Finally, those allegations specifically mentioned above, demand dismissal since the Federal Government is an indispensable party to their resolution.

Respectfully submitted,

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STATE OF OHIO
COUNTY OF FRANKLIN } SS

I, ROBERT F. HOWARTH, JR., an attorney in the office of Charles E. Brown, Counsel of Record for Respondents Del Corso, Canterbury, Jones, Martin and Srp, herein, depose and say that on this 22nd day of January, 1973, I served three copies of the foregoing brief in opposition on Michael E. Geltner, Leonard J. Schwartz, American Civil Liberties Union of Ohio Foundation, Inc., 203 East Broad Street, Columbus, Ohio 43215; Melvin L. Wulf, Sanford Jay Rosen, Joel M. Gora, American Civil Liberties Union of Ohio Foundation, Inc., 22 East 40th Street, New York, New York 10016; Nelson G. Karl, 33 Public Square, Cleveland, Ohio 44113; Walter S. Haffner, 1008 Standard Building, Cleveland, Ohio 44113; attorneys for petitioner, no Counsel of Record having been designated, by depositing the same in a United States mailbox, with first class postage prepaid, addressed to each of the attorneys above at their designated address, being the only parties hereto required to be served.

Robert F. Howarth

ROBERT F. HOWARTH, JR.

Subscribed and sworn to before me this 22nd day of January, 1973.

William H. Allen, Jr.

WILLIAM H. ALLEN, JR.
Attorney-At-Law
Notary Public-State of Ohio
My Commission Has No Expiration Date
Section 147.03, O.R.C.